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## Insurance

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# Insurance

by **Bradley S. Wolff\***

**Maren R. Cave\*\***

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## I. INTRODUCTION

During this survey period, the courts in Georgia seemed to take a respite from the usual litany of automobile and uninsured motorist (UM) cases, the summaries of which typically populate this annual update. Instead, the courts seemed to focus more on liability insurance issues, rendering many decisions on well-known principles of law and a few important decisions concerning offers of settlement, counteroffers, notice, and the use of intervention in coverage disputes. Particularly noteworthy were two cases involving offers of settlement, one where an offer was deemed inadequate as a time-limited demand and another where acceptance of an offer was deemed inadequate where a proffered release proposed different settlement terms.

In the automobile arena, only one UM decision and one commercial trucking decision involved previously undecided issues. In the former, the Georgia Court of Appeals held that an automobile policy may provide UM coverage for a designated group of insureds and no coverage for others. In the latter, the United States Court of Appeals for

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the Eleventh Circuit, in an unpublished opinion, held that an umbrella policy issued to cover the owner of a trailer also provided coverage to the driver of the truck who allegedly caused the collision as well as to the driver's employer.

In the property arena, the survey period found both state and federal decisions on first-party issues like non-cooperation, judicial estoppel, valued policy law, diminished value, and principles relating to the proper construction of policy terms. While only a few of the property cases included in this survey have precedential value, the other cases were included because they reflect trends, arguments, or issues that practitioners may consider unique or important in the property insurance arena.<sup>1</sup>

## II. AUTOMOBILE INSURANCE CASES

### A. "Tiered" Uninsured Motorist Coverage Permissible

In *Jones v. Federated Mutual Insurance Co.*,<sup>2</sup> the Georgia Court of Appeals held that an automobile insurer may provide UM coverage to only a certain group of insureds and exclude such coverage for all others with the written election of the named insured.<sup>3</sup> A husband and wife were test-driving a new vehicle owned by Five Star Automotive Group and insured by Federated Mutual Insurance Co. (Federated Mutual) when the vehicle was rear-ended. The couple brought suit against the at-fault driver and accepted the liability limits from his insurer. However, the couple did not have personal automobile insurance and sought to recover UM benefits from Federated Mutual. The Federated Mutual policy explicitly limited UM benefits to directors, officers, and owners of Five Star and their family members.<sup>4</sup> Five Star rejected, in writing, UM coverage for "any other person who qualifies as an insured."<sup>5</sup> Federated Mutual was granted summary judgment on the ground that the couple was not within the designated group afforded UM benefits under the policy.<sup>6</sup>

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1. For an analysis of insurance law during the prior survey period, see Thomas D. Martin, Bradley S. Wolff & Maren R. Cave, *Insurance, Annual Survey of Georgia Law*, 70 MERCER L. REV. 111 (2018).

2. 346 Ga. App. 237, 816 S.E.2d 105 (2018).

3. *Id.* at 244, 816 S.E.2d at 111.

4. *Id.* at 237–38, 816 S.E.2d at 106–07.

5. *Id.* at 238, 816 S.E.2d at 107.

6. *Id.* at 238, 816 S.E.2d at 108.

On appeal, the Joneses argued that they were “insureds” within the definition provided by O.C.G.A. § 33-7-11,<sup>7</sup> and the statute required UM coverage for all insureds unless it is rejected entirely by a named insured.<sup>8</sup> The court rejected this argument, holding that the UM statute did not impose an “all or nothing” restriction on insurers and insureds.<sup>9</sup> Rather, relying on *Crouch v. Federated Mutual Insurance Co.*,<sup>10</sup> the court stated that the UM statute protected an insured’s right to contract for “tiered” coverage.<sup>11</sup> In *Crouch*, the court held that a policy which provided high UM limits to a car dealership’s owner, officers, and directors, but lower limits for all other “insureds,” did not run afoul of the statute or public policy: “[a]s long as the mandatory UM minimum is met and optional UM coverage is offered pursuant to statutory requirements, a ‘combination[] of sublimits and interests restricted to named insureds and resident relatives’ contravenes neither the law nor public policy.”<sup>12</sup>

In *Jones*, the court extended the rule established by *Crouch* to allow an insurer, with the insured’s written permission, to exclude UM coverage altogether for persons other than a designated group of covered persons.<sup>13</sup> Although *Crouch* and *Jones* involved commercial insureds, neither case distinguished between personal and commercial policies. Therefore, it appears the court of appeals would also determine that a personal automobile or umbrella policy, which excluded from UM coverage all persons other than the named insured, a spouse, and resident relatives, was enforceable.

#### *B. Tractor-Trailer Accidents Involve Both Units of the Vehicle*

Where an umbrella policy is issued to cover liability arising from the use of a commercial trailer, does the coverage extend to accidents caused by the driver of a truck pulling the trailer as a matter of law? In *Great American Insurance Co. v. Moore Freight Service, Inc.*,<sup>14</sup> the United States Court of Appeals for the Eleventh Circuit held that the truck driver and his employer were entitled to coverage even though the umbrella policy was limited solely to the trailer, and the trailer

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7. O.C.G.A. § 33-7-11 (2019).

8. *Jones*, 346 Ga. App. at 240, 816 S.E.2d at 108.

9. *Id.* at 241, 816 S.E.2d at 109.

10. 257 Ga. App. 604, 571 S.E.2d 574 (2002).

11. *Jones*, 346 Ga. App. at 241, 816 S.E.2d at 109.

12. *Crouch*, 257 Ga. App. at 606, 571 S.E.2d at 577.

13. *Jones*, 346 Ga. App. at 244, 816 S.E.2d at 111.

14. 737 F. App’x 475 (11th Cir. 2018) (unpublished).

arguably “played no role” in causing the collision.<sup>15</sup> The driver of the tractor-trailer drove through a red light and collided with another vehicle, severely injuring the other driver and his passenger. The injured driver then sued the tractor-trailer driver, his employer, and Colonial Cartage Corporation (Colonial Cartage), the trailer owner. Colonial Cartage was a named insured under a commercial umbrella insurance policy issued by Great American Insurance Company (Great American). The driver of the tractor-trailer was an employee of Moore Freight, which also owned the tractor. Great American filed a declaratory judgment action, contending that the trailer did not cause the accident and that its umbrella coverage did not apply because the driver and Moore Freight were not insureds under its policy.<sup>16</sup> The underlying policy, from which Great American’s coverage obligation was determined, extended “insured” to include not only the policyholder, but also “[a]nyone . . . while using with [the policyholder’s] permission a covered ‘auto’ [that the policyholder] own[s], hire[s] or borrow[s] . . . .”<sup>17</sup> The underlying policy excluded the following from this definition: “[t]he owner, or any ‘employee’, agent or driver of the owner, or anyone else from whom [the policyholder] hire[s] or borrow[s] a covered ‘auto.’”<sup>18</sup>

The Eleventh Circuit, in an unpublished opinion, affirmed the trial court’s ruling against Great American, based on the decisions of other courts, holding that accidents involving tractor-trailers are deemed to have occurred from the use of both the tractor and the trailer as a matter of law.<sup>19</sup> The court rejected Great American’s argument that the policy exclusion applied because Moore Freight owned the truck which was “hired” or “borrowed” by the trailer owner.<sup>20</sup> Instead, the court held that, because nothing in the policy unambiguously excluded coverage in this situation, the policy would be construed in favor of coverage.<sup>21</sup> Because the driver and his employer were “insureds” with respect to their use of the trailer, the exception from coverage based on Moore Freight’s ownership of the truck would not be applied where the

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15. *Id.* at 477–78.

16. *Id.* at 476.

17. *Id.* at 477.

18. *Id.*

19. *Id.* (citing *Blue Bird Body Co. v. Ryder Truck Rental, Inc.*, 583 F.2d 717, 726 (5th Cir. 1978) (“[N]early every jurisdiction to face the question has held that an accident involving a tractor/trailer unit arises out of the use of both regardless of which part of the unit was actually involved in the accident.” *Id.* at 726.)). No decision from a Georgia appellate court was cited by the Eleventh Circuit and the court noted in *Blue Bird Body* that the Georgia courts have not ruled on the issue. 583 F.2d at 727 n.8.

20. *Great Am. Ins. Co.*, 737 F. App’x at 478.

21. *Id.*

accident was deemed to have arisen from the use of the combined tractor-trailer.<sup>22</sup>

### III. LIABILITY INSURANCE CASES

#### *A. Bad Faith and the Duty to Settle*

In perhaps the most important and closely watched liability insurance decision of this past year, the Georgia Supreme Court held that an insurer's duty to settle only arises when the injured party presents a valid offer to settle within the insured's policy limits.<sup>23</sup> *First Acceptance Insurance Company of Georgia, Inc. v. Hughes*<sup>24</sup> began after First Acceptance Insurance Company of Georgia, Inc.'s (First Acceptance) insured caused an automobile accident that resulted in his death, injuries to several others, and claims that exceeded the minimum limits of his coverage.<sup>25</sup> Counsel for one of those claimants sent a letter to First Acceptance offering to settle his clients' claims for the "available policy limits" and expressing an interest in attending a joint settlement conference with the other individuals injured in the accident.<sup>26</sup> Notably, that settlement letter did not contain any time limit for First Acceptance to respond. When First Acceptance did not respond after forty-one days, the claimants revoked their offer to settle and proceeded with their lawsuit.<sup>27</sup>

After a DeKalb County jury awarded the claimants \$5.3 million, the administrator of the estate of First Acceptance's insured filed suit against the insurer, alleging First Acceptance was negligent and acted in bad faith by failing to settle for the policy limit demand.<sup>28</sup> Summary judgment was granted to First Acceptance, but later reversed by the Georgia Court of Appeals.<sup>29</sup>

In concluding First Acceptance was indeed entitled to summary judgment, the Georgia Supreme Court focused specifically on the lack of any time deadline presented in the letter demanding policy limits, calling into question whether First Acceptance was even required to

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22. *Id.*

23. *First Acceptance Ins. Co. of Ga. v. Hughes*, 305 Ga. 489, 489, 826 S.E.2d 71, 73 (2019).

24. *Id.* at 489, 826 S.E.2d at 71.

25. *Id.* at 490, 826 S.E.2d at 73.

26. *Id.* at 491, 826 S.E.2d at 73–74.

27. *Id.* at 491, 826 S.E.2d at 74.

28. *Id.*

29. *Id.* at 492, 826 S.E.2d at 74.

respond within the thirty-day period alleged by the claimants.<sup>30</sup> The court concluded it was not required to respond within that period of time and that First Acceptance's failure to do so was not bad faith.<sup>31</sup> As a result, the supreme court concluded that First Acceptance was entitled to summary judgment as the offer "was not a time-limited settlement demand" and "First Acceptance was not put on notice that its failure to accept the offer within any specific period would constitute a refusal of that offer."<sup>32</sup> In the *Hughes* decision, the Georgia Supreme Court expressly concluded as a matter of law that First Acceptance did not act unreasonably in failing to accept the offer before it was withdrawn by these claimants.<sup>33</sup>

### *B. Standard Release Deemed Counteroffer*

In another decision involving an insurer's handling of a settlement offer, the Georgia Court of Appeals in *Duenas v. Cook*<sup>34</sup> held that an insurance company did not accept a settlement offer (that only bodily injury claims would be released), and there was no enforceable settlement agreement when the company required execution of a standard release that was contrary to the terms of the settlement.<sup>35</sup> Duenas was injured in an automobile–bicycle accident and sent a time-limited settlement offer to Nationwide, the insurer for the at-fault driver. That time-limited demand expressly stated that only Duenas' "personal injury/bodily injury claims" would be released.<sup>36</sup> While Nationwide agreed in writing to pay its policy limits, it also sent to Duenas a "limited release" with its purported acceptance which contained language that Duenas would release "any and all claims" including property damage.<sup>37</sup> The court noted that the "cover email transmitting the release merely forwarded the documents and did not indicate that it was a draft that could be revised to conform to the terms of the Settlement Offer."<sup>38</sup> The court of appeals concluded this was a

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30. *Id.* at 496, 826 S.E.2d at 77 (quoting *Simpson & Harper v. Sanders & Jenkins*, 130 Ga. 265, 271, 60 S.E. 541, 543 (1908) (if an offer "is silent as to the time given for acceptance, the offer will be construed to remain open for a reasonable time.")).

31. *Id.* at 497, 826 S.E.2d at 78.

32. *Id.* at 496, 826 S.E.2d at 77.

33. *Id.* at 490, 826 S.E.2d at 73.

34. 347 Ga. App. 436, 818 S.E.2d 629 (2018), *reconsideration denied* (Oct. 1, 2018), *and cert. denied*, 2019 Ga. LEXIS 368 (May 20, 2019).

35. *Id.* at 442, 818 S.E.2d at 634.

36. *Id.* at 437, 818 S.E.2d at 630–31.

37. *Id.* at 442, 818 S.E.2d at 633.

38. *Id.* at 442, 818 S.E.2d at 633–34 (citing *Sherman v. Dickey*, 322 Ga. App. 228, 231–32, 744 S.E.2d 408, 411 (2013)).

counteroffer, as it imposed new conditions, namely requiring in the proffered release that the property damage claim also be waived.<sup>39</sup> The court concluded that Nationwide did not “unequivocally accept” the demand and therefore there was no binding settlement.<sup>40</sup>

*C. Publicly Funded Insurance Not Excess to Privately Funded Insurance*

In response to a certified question, the Georgia Supreme Court addressed competing “other insurance” clauses in two overlapping policies covering the same loss.<sup>41</sup> In *National Casualty Co. v. Georgia School Boards Association-Risk Management Fund*,<sup>42</sup> the Georgia Supreme Court held that no law or public policy warranted coverage provided by the Georgia School Boards Association-Risk Management Fund (Risk Fund) to be excess to a commercial liability insurance policy.<sup>43</sup> The Risk Fund policy and the commercial policy issued by National Casualty Company each contained “other insurance” provisions with the intention of each being excess to any other insurance.<sup>44</sup> Following the precedent of *State Farm Fire & Casualty Co. v. Holton*,<sup>45</sup> where the Georgia Court of Appeals held that such competing “other insurance” clauses are deemed “irreconcilable, cancel each other out, and the liability is to be divided equally between them,”<sup>46</sup> the supreme court then inquired whether Georgia law or public policy justified a departure from *Holton*, where a state fund paid by taxpayers was involved.<sup>47</sup> The supreme court concluded there was no reason to depart from *Holton*, holding that there was “no apparent public policy which would be furthered by [a] requirement that commercial [] funds be exhausted before legislatively mandated public funds” be used.<sup>48</sup> Indeed, the supreme court stated that “the bedrock public policy of freedom of contract would be frustrated” if such a

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39. *Id.* at 442, 818 S.E.2d at 634.

40. *Id.*

41. *Nat'l Cas. Co. v. Ga. Sch. Bds. Ass'n-Risk Mgmt. Fund*, 304 Ga. 224, 228, 818 S.E.2d 250, 253 (2018).

42. *Id.* at 224, 818 S.E.2d at 250.

43. *Id.* at 231–32, 818 S.E.2d at 255–56. The Risk Management Fund, through the Georgia School Boards Association, is an agency created by O.C.G.A. §§ 20-2-2001–20-2-2002 (2019), and provided coverage for the Professional Association of Georgia Educators. See *National*, 304 Ga. at 224–25, 818 S.E.2d at 251–52.

44. *Id.* at 225–26, 818 S.E.2d at 252.

45. 131 Ga. App. 247, 205 S.E.2d 872 (1974).

46. *National*, 304 Ga. at 228, 818 S.E.2d at 253 (quoting *Holton*, 131 Ga. App. at 248–49, 205 S.E.2d at 872–73).

47. *Id.* at 229, 818 S.E.2d at 254.

48. *Id.* at 231, 818 S.E.2d at 255.

requirement existed, and would render “meaningless the bargained-for ‘other insurance’ provisions contained” in the policies.<sup>49</sup>

*D. Notice of A Claim or Lawsuit*

The Georgia Court of Appeals issued two separate decisions reminding us of the obligations imposed on an insured to timely provide notice of a claim or lawsuit to an insurance carrier. In *Taylor v. State Farm Fire & Casualty Co.*,<sup>50</sup> the Georgia Court of Appeals rejected the arguments presented by a couple who claimed State Farm Fire & Casualty Co. (State Farm) had constructive knowledge of the claims against them by their homeowners’ association.<sup>51</sup> The Taylors sued their neighborhood association after fines were imposed on them arising over a dispute related to the ownership and return of community email accounts. The association filed a counterclaim for breach of fiduciary duties and other duties owed in conjunction with Alberta Taylor’s work on a committee within the neighborhood. After discovering the association maintained liability insurance with State Farm, the Taylors sent a copy of the lawsuit they filed against the association to State Farm, but made no reference to the counterclaims against them and did not request coverage for those counterclaims under the State Farm policy. Nearly eighteen months later, the Taylors sent another letter to State Farm, this time claiming to be insureds under the policy issued to the association, providing a copy of the counterclaim to State Farm for the first time, and requesting coverage.<sup>52</sup> State Farm denied coverage based on the Taylors’ failure to meet the condition in the policy which obligated them to inform State Farm of any lawsuit “as soon as practicable.”<sup>53</sup> The trial court granted summary judgment to State Farm, and the Taylors appealed.<sup>54</sup>

The Georgia Court of Appeals affirmed summary judgment to State Farm, concluding that “timely notice was a condition precedent to coverage,” and that the first letter the Taylors sent to State Farm “cannot be considered timely notice under the policy.”<sup>55</sup> Notably, the court rejected the Taylors’ claim that “State Farm knew or should have known” of the counterclaims against them since State Farm was

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49. *Id.*

50. 347 Ga. App. 318, 819 S.E.2d 482 (2018).

51. *Id.* at 323, 819 S.E.2d at 485.

52. *Id.* at 319–21, 819 S.E.2d at 483–84.

53. *Id.* at 320–21, 819 S.E.2d at 484.

54. The trial court concluded the Taylors were insureds under the State Farm policy, which was not contested on appeal. *Id.* at 321 n.2, 819 S.E.2d at 485 n.2.

55. *Id.* at 323–24, 819 S.E.2d at 485–86.

defending the association, explaining that State Farm’s knowledge would not relieve them of their “affirmative obligation under the policy to provide notice of their claim and forward a copy of the counterclaims to State Farm.”<sup>56</sup>

Similarly, in *Johnson & Bryan, Inc. v. Utica Mutual Insurance Company*,<sup>57</sup> the Eleventh Circuit affirmed a trial court’s decision to dismiss a broker’s lawsuit against Utica Mutual Insurance Co. (Utica), its insurer, after it denied coverage and refused to defend the broker following a seventy-two-day delay in providing a demand letter.<sup>58</sup> A demand letter was sent to the broker alleging it failed to procure the appropriate coverage for its clients and failed to provide them with a copy of their policy. The broker received the demand letter in its mailroom, but the demand letter was subsequently misplaced, never promptly sent to Utica (which issued an errors and omissions policy to the broker), and only discovered after a lawsuit was filed against the broker.<sup>59</sup> In affirming dismissal of the lawsuit against Utica, the Eleventh Circuit concluded the broker’s “obligation to provide notice to [Utica] was triggered by [the broker’s] receipt” of the letter, and the seventy-two-day delay in providing notice to Utica violated the policy’s “immediate notice requirement.”<sup>60</sup> Furthermore, the Eleventh Circuit rejected the broker’s proffered justification for the delay—a mailroom mistake—noting that if delay was due to the insured’s own negligence, the delay was unreasonable as a matter of law.<sup>61</sup>

#### *E. Declaratory Relief Favored Over Intervention*

Finally, in *O’Brien v. Builders Insurance*,<sup>62</sup> the Georgia Court of Appeals concluded an insurer cannot use intervention<sup>63</sup> to litigate potential coverage disputes, reminding carriers that the proper procedural remedy was to initiate a declaratory judgment action.<sup>64</sup> Builders Insurance (Builders) filed a motion to intervene in a lawsuit between its insureds (a construction company and its owner) and various plaintiffs, suing for defective construction, breach of contract,

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56. *Id.* at 323, 819 S.E.2d at 485.

57. 741 Fed. App’x 722 (11th Cir. 2018).

58. *Id.* at 724–25.

59. *Id.* at 724.

60. *Id.* at 725.

61. *Id.* at 726.

62. 350 Ga. App. 77, 827 S.E.2d 917 (2019).

63. See O.C.G.A. § 9-11-24(a)(2) and (b)(2) (2019), which provide grounds for intervention of right and permissive intervention, respectively, upon a timely application.

64. *O’Brien*, 350 Ga. App. at 79, 827 S.E.2d at 918.

and breach of warranty. The motion to intervene was filed three years after the plaintiffs' complaint was filed but was limited insofar as Builders only sought to participate in discovery and propose a special verdict form. The trial court granted Builders's motion and the plaintiffs filed an application for appeal, which was granted.<sup>65</sup> In reversing the trial court's order granting intervention, the court of appeals noted that a party "may not intervene where he has a remedy which may be asserted in a proper proceeding."<sup>66</sup> More importantly, the court concluded that "a declaratory judgment action is a proper proceeding for determining issues of insurance coverage," and Builders could "pursue its own independent [declaratory judgment] action" to determine insurance coverage.<sup>67</sup> Accordingly, the court concluded that the trial court abused its discretion by authorizing Builders's intervention.<sup>68</sup>

#### IV. PROPERTY INSURANCE CASES

##### *A. Offer to Sit for an EUO Does Not Cure a Breach*

In *Hutchinson v. Allstate Insurance Company*,<sup>69</sup> Hutchinson suffered a fire loss on September 2, 2014. During Allstate Insurance Company's (Allstate) investigation, questions arose concerning Hutchinson's residency in the home. In order to evaluate this potential coverage issue, Allstate demanded Hutchinson's Examination Under Oath (EUO). At the EUO, Hutchinson disputed statements in previous letters from Allstate's attorney regarding his responsiveness to Allstate's requests. Hutchinson said he would cooperate but only if Allstate recanted the statements in the letters. Allstate refused. Allstate's attorney explained that Hutchinson's refusal could result in a denial of the claim. Allstate then began questioning Hutchinson about his residency in the home. Hutchinson sat silently, refusing to answer the questions. Nine days later, Allstate denied his claim on the grounds that Hutchinson breached the policy by refusing to answer questions during his EUO.<sup>70</sup>

Over a year after the denial, Hutchinson's attorney sent a bad faith demand letter to Allstate simultaneously offering for Hutchinson to

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65. *Id.* at 77, 827 S.E.2d at 918.

66. *Id.* at 78, 827 S.E.2d at 918 (quoting *Potter's Properties, LLC v. VNS Corp.*, 306 Ga. App. 621, 623, 703 S.E.2d 79, 81 (2010)).

67. *Id.* at 79, 827 S.E.2d at 918–19.

68. *Id.* at 79, 827 S.E.2d at 919.

69. 741 F. App'x 680 (11th Cir. 2018) (unpublished).

70. *Id.* at 681–82.

submit to another EUO. Allstate replied that it would reconvene the EUO, subject to a reservation of all rights and defenses by Allstate. The EUO never occurred. Hutchinson filed suit against Allstate, alleging breach of contract and bad faith. The district court granted summary judgment to Allstate and Hutchinson appealed.<sup>71</sup>

On appeal, Hutchinson acknowledged that he was not legally excused from complying with the policy conditions and that a refusal to submit to the EUO was a breach of the policy. However, Hutchinson argued that his offer to submit to the EUO created a jury question regarding his compliance with the policy.<sup>72</sup> The Eleventh Circuit disagreed.<sup>73</sup> Relying upon its previous decision in *Pervis v. State Farm Fire and Casualty Company*,<sup>74</sup> the court concluded that a belated offer to submit to the EUO did not cure the breach, quoting its previous holding that “State Farm had no obligation to repeat its request for an examination after appellant breached the contract . . . .”<sup>75</sup>

### *B. Judicial Estoppel*

In *Squires v. State Farm Fire and Casualty Company*,<sup>76</sup> Plaintiffs Kevin and Aleta Squires had a fire loss at their home in Canton. Following the fire, the Squires submitted five different inventories and proofs of loss to their insurance company, State Farm, for their personal property loss. The documents asserted values for personal property ranging from a little over \$90,000 to almost \$145,000. Two of the inventories were submitted while the Squires had a Chapter 13 bankruptcy proceeding pending. The Squires valued their personal property in the bankruptcy petition at only \$2,925.<sup>77</sup>

State Farm alleged that photos taken after the fire did not substantiate the large quantity of items claimed.<sup>78</sup> State Farm denied the Squires’ claim on the grounds that they had misrepresented and concealed material information. The Squires filed suit against State Farm for breach of contract and bad faith.<sup>79</sup>

The district court held that the Squires were judicially estopped from asserting a claim for more than the amount disclosed in their

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71. *Id.* at 682.

72. *Id.*

73. *Id.*

74. 901 F.2d 944, 947 (11th Cir. 1990).

75. *Hutchinson*, 741 F. App’x at 682 (citing *Pervis*, 901 F.2d at 948).

76. No. 1:17-CV-2613-RWS, 2019 U.S. Dist. LEXIS 31954 (N.D. Ga. Feb. 28, 2019).

77. *Id.* at \*1–2.

78. *Id.* at \*7.

79. *Id.* at \*2–3.

bankruptcy proceedings.<sup>80</sup> The court determined that the inconsistency “[made] a mockery of the judicial system” because it was calculated to obtain unfair advantage.<sup>81</sup> State Farm was therefore granted summary judgment.<sup>82</sup>

Importantly, the district court applied the higher level of scrutiny required by the Eleventh Circuit in *Slater v. U.S. Steel*.<sup>83</sup> The district court analyzed the “totality of [] circumstances” required by the court in *Slater*, detailing how the Squires’ inconsistent disclosures were indisputably “calculated to make a mockery of the judicial system.”<sup>84</sup> In this connection, the court first noted that the Squires made inconsistent statements regarding the reasons for discrepancy between the bankruptcy and insurance claim disclosures.<sup>85</sup> During her examination under oath, Ms. Squires said that the sworn disclosures in the bankruptcy petition were made based upon the advice of counsel. Later, at her deposition, she said that the bankruptcy disclosures included only her business’s personal property since the bankruptcy was for her business.<sup>86</sup> Finally, in response to State Farm’s motion for summary judgment, Ms. Squires argued that amounts asserted in the bankruptcy petition were simply “thrift store values” for the same items claimed in the fire.<sup>87</sup> Under these circumstances, the court concluded that the Squires made inconsistent sworn statements in the bankruptcy and the insurance claim.<sup>88</sup>

Having concluded that there were inconsistent sworn statements, the court then went on to analyze whether the inconsistencies were calculated to make a mockery of the judicial system.<sup>89</sup> The factors that the court considered included findings that the Squires were discharged for approximately \$34,000 in unsecured debt but never informed the bankruptcy court that they submitted a claim for over \$140,000 with State Farm for their personal property.<sup>90</sup> The Squires never amended their bankruptcy petition to disclose their fire claim despite numerous other amendments.<sup>91</sup> The Squires had motive to conceal the personal

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80. *Id.* at \*10.

81. *Id.*

82. *Id.* at \*11.

83. *Id.* at \*9 (citing *Slater v. U.S. Steel*, 871 F.3d 1174 (11th Cir. 2017)).

84. *Id.*

85. *Id.* at \*8–9.

86. *Id.* at \*8.

87. *Id.*

88. *Id.* at \*8–9.

89. *Id.* at \*9.

90. *Id.*

91. *Id.* at \*7.

property assets. The Squires never corrected the inconsistency between their insurance claim and their bankruptcy disclosures. The Squires were educated, sophisticated parties. And the Squires took inconsistent positions despite ample access to legal counsel.<sup>92</sup>

Based upon these circumstances, the court concluded that the Squires were estopped from claiming more than \$2,925 in the claim against State Farm.<sup>93</sup> Because State Farm previously paid \$4,000 before litigation ensued, State Farm had satisfied its obligations under the policy.<sup>94</sup> Further, because State Farm had reasonable grounds for contesting the Squires' claim, there could be no bad faith as a matter of law.<sup>95</sup>

### *C. Policy Declarations Do Not Create Ambiguity*

In *Goldeagle Ventures, LLC v. Covington Specialty Insurance Company*,<sup>96</sup> a lightning storm damaged 103 halide lights that were attached to a building owned by Goldeagle Ventures, LLC (Goldeagle). The lights were attached to, but were not permanently installed in, the building. Additionally, the lights had been purchased prior to Goldeagle's tenancy and had not been paid for by Goldeagle.<sup>97</sup>

Goldeagle filed an insurance claim with its insurer, Covington Specialty Insurance Company (Covington), and the claim was subsequently denied. Goldeagle then filed suit against Covington and sought summary judgment, asserting that the lights were covered under Goldeagle's insurance. Covington argued that the lights were not covered. Covington prevailed.<sup>98</sup> Goldeagle appealed.<sup>99</sup>

The principal argument asserted by Goldeagle was that the Covington policy was ambiguous.<sup>100</sup> The policy stated Covington would pay for loss or damage to Covered Property at the premises described in the Declarations.<sup>101</sup> In the policy itself, "Covered Property" could include the "Building," "Your Business Personal Property," and "Personal Property of Others," but only if "a Limit of Insurance is

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at \*11.

96. 349 Ga. App. 446, 825 S.E.2d 881 (2019).

97. *Id.* at 446–47, 825 S.E.2d at 883.

98. *Id.* at 448, 825 S.E.2d at 883–84.

99. *Id.* at 448, 825 S.E.2d at 884.

100. *Id.* at 450, 825 S.E.2d at 885.

101. *Id.* at 447, 825 S.E.2d at 883.

shown in the Declarations for that type of property.”<sup>102</sup> The Declarations stated that “[i]nsurance at the described premises applies only for coverage for which a limit of insurance is shown.”<sup>103</sup> The only limit of insurance shown in the Goldeagle Declarations was for Business Personal Property. Goldeagle did not purchase or pay a premium for the “Building” or for “Personal Property of Others.”<sup>104</sup>

Nevertheless, because the standard form policy contained these other coverages, Goldeagle apparently argued that the Declarations and the policy created an ambiguity.<sup>105</sup> The court rejected the argument, noting that “insurers are ‘allowed to issue standard form policies, containing multiple coverage provisions, even though not all coverages have been purchased by an insured.’”<sup>106</sup> Quoting at length from a previous decision dealing with a similar contention, the court noted that the Declarations provide a roadmap for the coverages purchased by the insured and should be read together with, rather than separate from, the rest of the policy:

[t]he Declarations Page represents the means by which an insurer tailors its standard form policy to allow insureds to purchase only the types of coverage, and the amount of such coverage, that they desire. It “is the one part of the policy likely to be read by the insured, and contains the terms most likely to have been requested by the insured.” 16 Richard A. Lord, *Williston on Contracts*, § 49:25 (4th ed.); see also *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 775 A.2d 1262, 1270 (2001) (Because the declarations page is the “one page most likely to be read and understood by the insured,” insurers should “incorporate thereon as much information as may reasonably be included.”). For that reason, the form policy must be read together with the Declarations Page to determine exactly which coverages, and in what amounts, an insured has purchased.<sup>107</sup>

Accordingly, the court of appeals concluded that the policy was not ambiguous.<sup>108</sup>

Because Goldeagle only purchased coverage for its Business Personal Property, the court then analyzed coverage under this provision.<sup>109</sup> To

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102. *Id.* at 447–48, 825 S.E.2d at 883–84.

103. *Id.* at 450, 825 S.E.2d at 885.

104. *Id.*

105. *Id.*

106. *Id.* at 449, 825 S.E.2d at 885 (quoting *Simalton v. AIU Ins. Co.*, 284 Ga. App. 152, 154, 643 S.E.2d 553, 555 (2007)).

107. *Id.* at 449, 825 S.E.2d at 884–85 (quoting *Simalton*, 284 Ga. App. at 154, 643 S.E.2d at 555).

108. *Id.* at 450, 825 S.E.2d at 885.

be covered, the lights had to be “fixtures . . . (a) Made a part of the building or structure . . . and (b) . . . acquired or made at [Goldeagle’s] expense.”<sup>110</sup> The court used an ordinary dictionary meaning of the term “fixture” to conclude that the lights were not a permanently installed part of the building.<sup>111</sup> The court also determined that even if the lights could be considered fixtures, the lights were not “acquired or made at [Goldeagle’s] expense.”<sup>112</sup>

The court also rejected Goldeagle’s argument that the lights were Business Personal Property because the lights were “leased personal property for which [Goldeagle had] a contractual responsibility to insure.”<sup>113</sup> Goldeagle’s lease required Goldeagle to keep the premises in good repair but did not explicitly require Goldeagle to insure the lights.<sup>114</sup> With respect to insurance, the lease only required that Goldeagle purchase adequate coverage for Goldeagle’s “merchandise, trade fixtures, furnishing, wall covering, floor covering, carpeting, drapes, equipment[,] and all items of personal property of Tenant located on or within the Premises.”<sup>115</sup> Because the lease specifically included “lighting” in the list of items Goldeagle was required to maintain but excluded “lighting” from the list of assets Goldeagle was required to insure, the lease demonstrated that a duty to maintain was not equivalent to a duty to insure.<sup>116</sup> For these reasons, the court affirmed the trial court’s judgment in Covington’s favor.<sup>117</sup>

#### *D. Zillow and qPublic.net Not Reliable Sources for Valued Policy Dispute*

In *Hollingsworth v. LM Insurance Company*,<sup>118</sup> the United States District Court for the Middle District of Georgia rejected a *pro se* plaintiff’s attempt to rely upon online estimates of home values to establish that her fire-damaged home had been “wholly destroyed” under the Valued Policy Act.<sup>119</sup> Hollingsworth’s home sustained damage

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109. *Id.*

110. *Id.*

111. *Id.* at 450–51, 825 S.E.2d at 885.

112. *Id.* at 451, 825 S.E.2d at 886.

113. *Id.*

114. *Id.* at 451–52, 825 S.E.2d at 886.

115. *Id.* at 452, 825 S.E.2d at 886.

116. *Id.*

117. *Id.*

118. No. 5:17-cv-00494-TES, 2019 U.S. Dist. LEXIS 37419 (M.D. Ga. Mar. 8, 2019).

119. *Id.* at \*18, \*22; O.C.G.A. § 33-32-5(a) (2019).

from a fire but it did not burn to the ground.<sup>120</sup> Adjusters from her insurance company, LM Insurance Company (LM), an engineer, and several repair contractors consulted by the plaintiff all examined the premises but none concluded that the home was wholly destroyed.<sup>121</sup> Repair estimates included LM's estimate of about \$232,000, an informal verbal estimate from Paul Davis Restoration (PDR) of about \$325,000, and a written estimate from Sentry Construction Company (Sentry) for about \$366,000.<sup>122</sup> The policy limit for the structure was \$502,600. None of the estimates concluded that the house was a total loss.<sup>123</sup>

Hollingsworth sought the policy limits under Georgia's Valued Policy Act.<sup>124</sup> Under *Georgia Farm Bureau Mutual Insurance Company v. Brown*,<sup>125</sup> Hollingsworth asserted that "it would cost more to repair her house than to replace it and [that] photographs and other evidence show[ed] that her home ha[d] been substantially gutted by the fire due to the damage of structural components of the foundation . . ." <sup>126</sup> In making these assertions, Plaintiff relied upon her own

"prior experience with remodeling historic homes in the area," "a diploma in Carpentry . . . which include[d] a certification in framing," real estate estimates from Zillow.com and Realtor.com, a tax appraisal from qPublic.net, estimates of building costs from an unnamed person from the Home Builders Association of Middle Georgia, and photographs showing fire damage to her home.<sup>127</sup>

The court rejected Hollingsworth's arguments because she failed to submit any admissible evidence that the cost of repairing the home exceeded the cost of replacement.<sup>128</sup> Hollingsworth's experience in remodeling and her certification in framing lacked sufficient foundation and methodology to qualify her as an expert under the Federal Rules of Evidence.<sup>129</sup> Her remarks, if admissible at all, would only be admissible as lay opinion testimony.<sup>130</sup> However, as a property owner, she would only be permitted to provide her lay opinion regarding the value of her

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120. *Id.* at \*22.

121. *Id.* at \*8, \*15 n.12.

122. *Id.* at \*8–9.

123. *Id.* at \*12.

124. *Id.* at \*9.

125. 192 Ga. App. 504, 385 S.E.2d 87 (1989).

126. *Hollingsworth*, 2019 U.S. Dist. LEXIS 37419, at \*15–16.

127. *Id.* at \*16.

128. *Id.* at \*22.

129. *Id.* at \*16 n.13.

130. *Id.*

property.<sup>131</sup> “Value” was irrelevant since, under *Brown*, proof of the cost of new construction was needed.<sup>132</sup>

Additionally, Hollingsworth could not rely upon valuations from Zillow, Realtor.com, and qPublic.net to establish replacement values (that were less than the repair estimates) since the valuations were not authenticated and were unreliable hearsay.<sup>133</sup> The court noted that sites like Zillow.com and Realtor.com are “‘inherently unreliable’ because they are ‘participatory site[s]’ which allow homeowners ‘to input or change specific entries,’ much like Wikipedia allows the general public to edit its entries.”<sup>134</sup> In addition, the information was irrelevant under Federal Rule of Evidence 401 since the estimates included the value of the land (“the dirt on which her house sits”) “baked into” the prices given,<sup>135</sup> rather than replacement construction required by *Brown*.<sup>136</sup>

Hollingsworth also could not rely upon statements allegedly made by an unknown “secretary” at the Home Builders Association of Middle Georgia for the cost of new construction.<sup>137</sup> Such remarks were inadmissible hearsay and were excluded since Hollingsworth made no discernable argument that the unknown secretary was qualified to provide replacement estimates.<sup>138</sup>

Furthermore, Hollingsworth’s photographs did not indicate that the home was substantially gutted by fire because many of the photos depicted rooms in the home “undergoing” a “cosmetic remodel” with no fire damage, while only some showed “extensive fire damage” to a single area (the “dining room area”).<sup>139</sup> Further, “despite the clearly visible char throughout some areas of [the] home, no one—aside from [Hollingsworth]—[took] the position that the photographs show[ed] ‘substantial gut.’”<sup>140</sup> The court noted that the home was still standing and was supported by all pre-existing walls.<sup>141</sup> Because the fire damage

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131. *Id.* at \*16 n.13 (citing *United States ex rel. TVA v. An Easement & Right-Of-Way over 6.09 Acres of Land*, 140 F. Supp. 3d 1218, 1236–44 (N.D. Ala. 2015)).

132. *Id.*

133. *Id.* at \*17.

134. *Id.* at \*18 (citing *In re DaRosa*, 442 B.R. 173, 177 (Bankr. D. Mass. 2010)).

135. *Id.* at \*18–19.

136. *Id.* at \*13–14.

137. *Id.* at \*20–21.

138. *Id.*

139. *Id.* at \*21.

140. *Id.*

141. *Id.* at \*22.

was largely interior, no reasonable jury could find that the home was wholly destroyed.<sup>142</sup>

Because Hollingsworth failed to submit any admissible evidence that the cost of repairing the home exceeded the cost of replacing it entirely, and because the photographs did not indicate that the house was substantially gutted by fire, summary judgment was granted in LM's favor.<sup>143</sup> The court also rejected Hollingsworth's bad faith claim since it was reasonable for LM to withhold payment of the policy limit pending a decision under the Valued Policy Act.<sup>144</sup>

#### *E. Contractor May Testify on Diminished Value*

The Georgia Court of Appeals considered whether excluding a witness was an abuse of discretion where that witness was offered as an expert or, alternatively, as a lay witness.<sup>145</sup> In *Woodrum v. Georgia Farm Bureau Mutual Insurance Company*,<sup>146</sup> William and Kathy Woodrum's home was damaged by a falling tree during a thunderstorm. Months later, when the Woodrums and their insurer, Farm Bureau Mutual Insurance Company (Farm Bureau), could not reach an agreement on the amount of the loss, the Woodrums demanded appraisal. Farm Bureau paid the appraisal award.<sup>147</sup>

Still, the Woodrums filed suit against Farm Bureau alleging that the house had diminished value (DV) because of the tree impact, that such DV was not included in the appraisal award, and that Farm Bureau failed to pay DV. In support of their claim, the Woodrums introduced an affidavit from a contractor (Hall) who had repaired the Woodrums' house and who opined that the value of the house was diminished due to a crack in the slab foundation. In his deposition, Hall said that the house lost 25% of its value due to the damage. Farm Bureau filed a motion to exclude Hall's testimony as both an expert and a lay witness and also moved for summary judgment since Hall's testimony was the only basis for the DV claim. The trial court granted both motions.<sup>148</sup>

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142. *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")).

143. *Id.* at \*22–23.

144. *Id.* at \*26.

145. *Woodrum v. Ga. Farm Bureau Mut. Ins. Co.*, 347 Ga. App. 89, 89, 815 S.E.2d 650, 651 (2018).

146. *Id.* at 89, 815 S.E.2d at 651.

147. *Id.* at 89–90, 815 S.E.2d at 651–52.

148. *Id.* at 90, 815 S.E.2d at 652.

The court agreed that Hall could be excluded as an expert on DV because the Woodrums failed to show the methodology underlying Hall's testimony.<sup>149</sup> Hall's affidavit did not describe a methodology by which he reached his conclusions and, at his deposition, the only basis he provided for his valuation was his experience.<sup>150</sup> Accordingly, the court affirmed that part of the trial court's order.<sup>151</sup>

However, the court reversed the trial court's exclusion of Hall as a lay witness.<sup>152</sup> Under the lay witness opinion rule,<sup>153</sup> a lay witness can give opinion testimony as to market value "if he or she has had an opportunity to form a reasoned opinion."<sup>154</sup> The court held that the evidence "amply" demonstrated that Hall could form a reasoned opinion as to the diminished value of the house based upon his experience and familiarity with the Woodrum's home.<sup>155</sup> Accordingly, the court concluded that Hall was qualified to give lay opinion testimony as to the effect of the foundation damage on the value of the home and that the trial court erred in excluding Hall's testimony as a lay witness.<sup>156</sup>

Notably, two of the judges on the panel concurred in the judgment only, rendering the case physical precedent only under Court of Appeals Rule 33.2(a).<sup>157</sup>

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149. *Id.* at 91–92, 815 S.E.2d at 653.

150. *Id.* at 92, 815 S.E.2d at 653.

151. *Id.*

152. *Id.* at 94, 815 S.E.2d at 654.

153. See O.C.G.A. § 24-7-701(b) (2019).

154. *Woodrum*, 347 Ga. App. at 92, 815 S.E.2d at 653.

155. *Id.* (relying on *Vitello v. Stott*, 222 Ga. App. 134, 136, 473 S.E.2d 504, 505–06 (1996)).

156. *Id.* at 93, 815 S.E.2d at 654.

157. *Id.* at 95, 815 S.E.2d at 655; GA. APP. CT. R. 33.2(a).

